

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2065

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FOR THE SECOND CIRCUIT**

DOCKET NO. 77-2065

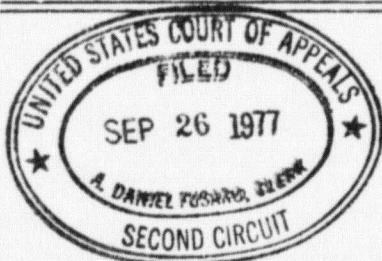
NAPIER TALTON,
PETITIONER - APPELLANT

vs.

CARL ROBINSON, WARDEN
CONNECTICUT CORRECTIONAL
INSTITUTION, SOMERS,
RESPONDENT - APPELLEE

On Appeal From the United States District Court
for the District of Connecticut

APPELLEE'S BRIEF



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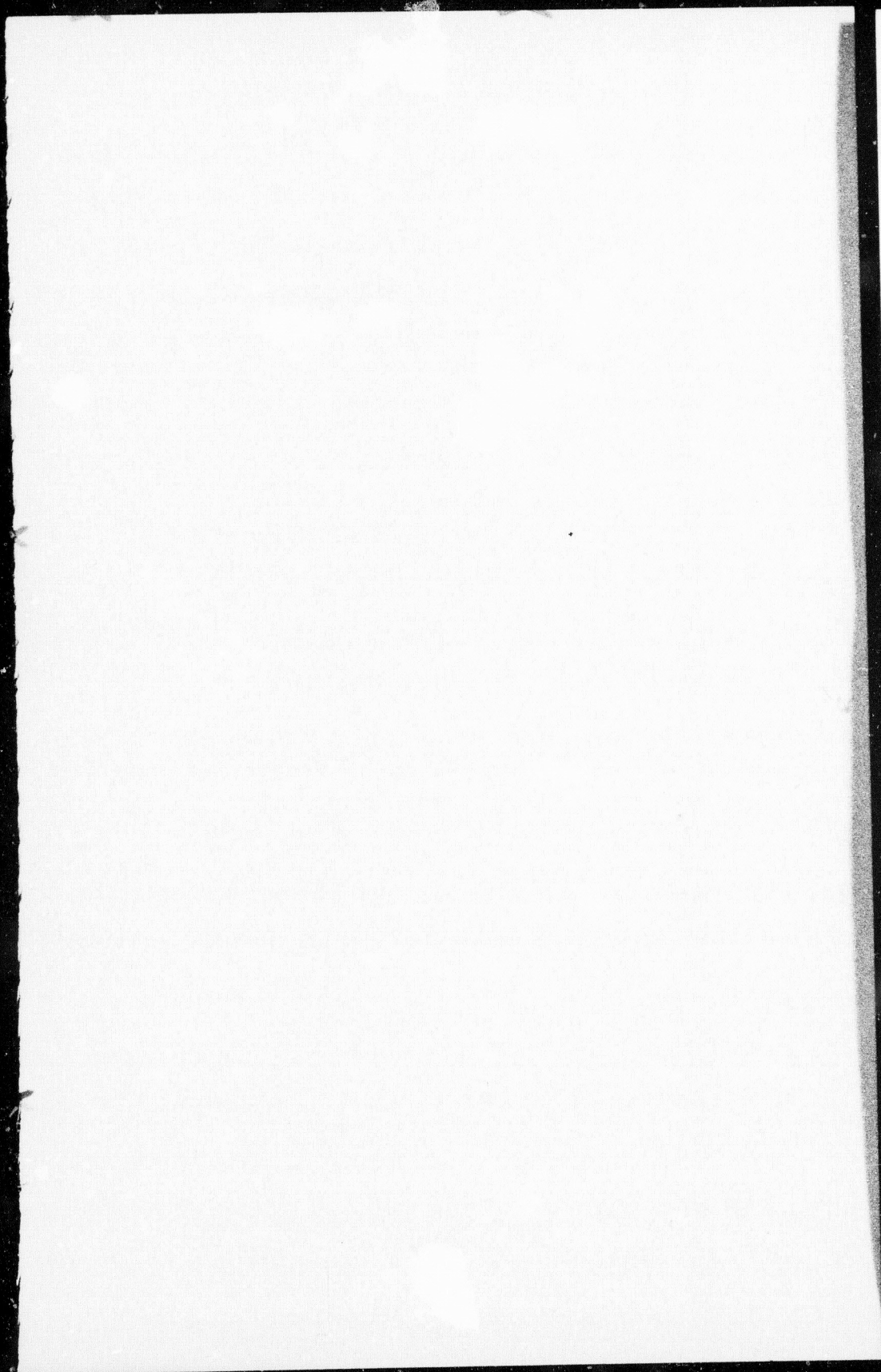


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STATEMENT OF ISSUES

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- I. Whether the Petitioner Was Denied His Constitutional Right to Due Process of Law When he Failed to Attend an In-chambers Hearing of Tapes of a Confession he had Made Since the Session Did Not Constitute a Critical Stage of the Proceedings Against Him at Which his Rights Were Substantially Affected?..... 4
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STATEMENT OF FACTS

On April 27, 1973, following a trial to the Court (George, J.), the Petitioner was convicted of Manslaughter in the First Degree in the Superior Court of the State of Connecticut at New Haven. At his trial, the Petitioner had been represented by the Public Defender (Anthony V. DeMayo) of said court. (Petition for Writ of Habeas Corpus, pg. 3 of the Joint Appendix).

The sole error claimed by the Petitioner in both the habeas corpus and the appellate courts of the State of Connecticut and, subsequently, on federal habeas corpus before the District Court (Blumenfeld, J.) was that the Petitioner was denied due process of law when certain tapes of a confession he gave to New Haven (Conn.) police officers were played in the judge's chambers in his absence, he having elected to absent himself from the hearing.

Detective Paul McCormick of the New Haven Police Department, on February 24, 1972, had talked with the Petitioner at the Detective Bureau. After warning the Petitioner of his Miranda rights, Detective McCormick received from the Petitioner three waiver forms signed by the Petitioner. A statement was then taken from the Petitioner by Det. McCormick in which he confessed to the killing of one Marsha Layne by means of a knife. The statement was then typed up and signed by the Petitioner and he initialed corrections in the statement. The statement made by the Petitioner was taped as he was asked questions. The signed statement was made by typing the words from the tape, which tape was saved in an evidence envelope and put into a safe until the time of trial. Detective McCormick testified at Petitioner's trial that he had not compared the tape with the statement but it had sounded to him like the conversations he had had with the Petitioner. (See pp. 19-24 of the trial transcript; Petitioner's Exhibit 1).

At this point in the trial, Petitioner's counsel, Mr. DeMayo, indicated that he would have no objection to the introduction of the signed statement, provided that he be given an opportunity to compare the statement with the tape at some time before the conclusion of the bench trial. (Tr. p. 24). The Court (George, J.) thereupon recessed and reconvened in-chambers. Present were Judge George, the Court Clerk, the State's Attorney (Mr. Markle), Mr. DeMayo, two New Haven Police Detectives, and the Court Reporter, who recorded the in-chambers proceedings (Tr. pp. 25,26).

After the tapes had been played in chambers and checked for their conformity with the written statement, the court returned to the courtroom, where the State's Attorney, in order to make the record complete, moved that the tapes of Detective McCormick's conversation with the Petitioner be introduced as full exhibits and that the tapes be played again, this time in open court. (Tr. pp. 26,27).

Petitioner's counsel, Mr. DeMayo, then responded as follows:

"MR. DEMAYO: I would object to the introduction of the tapes and to playing them again, your Honor, for this reason. Your Honor and I have both heard the entire playing of the tapes. It has consumed some twenty-five minutes, I suspect, or perhaps more, and I will have to concede that the tape and the statement are basically the same item. There may be a few expletives or pauses that were missed, but to the best of a human's ability, I would have to concede that one follows the other. I don't think they have to be played again for your Honor's benefit because your Honor sat and followed word for word the entire statement in chambers. I have an additional reason. When we recessed to hear these tapes in

chambers, I asked the defendant if he wanted to be present for that session and he indicated to me no, he was upset, tired and he would rather not. Your Honor will note that my defense in this case is an insanity defense indicating a charged-up emotional situation and the defendant has some deep emotional problems. Playing them in the courtroom again would serve no purpose. Your Honor is the judge of the facts and law here. You have heard them once and I don't believe that playing them again would serve any purpose." (Tr. pp. 27,28) (emphasis added).

Subsequently, the actual tapes (State's Exhibit L) were entered into evidence but the court acceded to the request of Petitioner's counsel that the tapes not be played again. (Tr. p. 28)

The Petitioner's argument - i.e., that he was denied due process of law simply because he did not attend the in-chambers hearing was denied in a state habeas corpus petition (Shea, J.), on February 12, 1975. After that court granted permission for the Petitioner to appeal that decision to the Supreme Court of the State of Connecticut, that court upheld the state habeas corpus decision in Talton v. Warden, 171 Conn. 378, 370 A.2d 965 (1976).

Having thereby exhausted his state remedies, the Petitioner continued on to raise the identical issue in the federal courts. The District Court (Blumenfeld, J.), after conducting a hearing on the merits of the petition, at which time the Petitioner was allowed to testify, on May 25, 1977, filed a Memorandum of Decision denying the relief sought by the Petitioner. Said denial is the source of this appeal to the Second Circuit Court of Appeals.

ARGUMENT

I.

THE PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN HE FAILED TO ATTEND AN IN-CHAMBERS HEARING OF TAPES OF A CONFESSION HE HAD MADE SINCE THE SESSION DID NOT CONSTITUTE A CRITICAL STAGE OF THE PROCEEDINGS AGAINST HIM AT WHICH HIS RIGHTS WERE SUBSTANTIALLY AFFECTED.

In his brief, the Petitioner has correctly stated the general rule on this question, that ". . . One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of the trial." Illinois v. Allen, 397 U.S. 337, 338 (1972). Like any other general assertion, however, this rule is open to interpretation and explanation. A careful consideration of what took place at the Petitioner's trial would indicate that what transpired outside the presence of the Petitioner here was not a part of the Petitioner's "trial" as that term is commonly understood within a constitutional context.

The right to be present is derived both from the confrontation clause of the sixth amendment, Illinois v. Allen, supra, and from the due process clause of the fourteenth amendment, Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934).

The confrontation clause establishes the right of an accused to confront and test the testimony of his accusers. Because it is designed to implement this right of confrontation, this aspect of the right to be present is mainly concerned with the stages of trial in which there are witnesses to be questioned. Snyder v. Massachusetts, Id. at 107. The due process clause, however, is somewhat wider in

impact, for it requires the presence of the defendant "to the extent that a fair and just hearing would be thwarted by his absence. . . ." Id. at 108. Therefore, the due process clause mandates the presence of the defendant "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Id. at 105-06.

However, neither source of the right to be present supports an extension of that right to the in-chambers proceedings in this case. These proceedings were conducted for the sole purpose of testing the authenticity of a transcript of a tape-recorded confession. The proper procedure for authenticating a transcript is for the court to listen to the tapes in camera in order to compare them with the transcript. United States v. Chiarizio, 525 F.2d 289, 293-94 (2d Cir. 1975); United States v. Carson, 464 F.2d 424, 436-37 (2d Cir. 1972). Such an in camera proceeding may be unnecessary in a bench trial (such as here) but the procedure followed in this case was surely not improper.

The due process clause does not require the presence of the defendant "when his presence, would be useless, or benefit but a shadow." Snyder v. Massachusetts, supra, 291 U.S. at 106-07. For this reason, the right to be present does not extend to in-chambers discussions of points of law. See United States v. Gregorio, 497 F.2d 1253, 1258-60 (4th Cir.) cert. denied, 419 U.S. 1024 (1974). In light of the purposes of the in-chambers proceedings in this case, Petitioner's presence had no "relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." His presence was not necessary to the proper determination of whether the tapes were accurately transcribed. He was in no better position to compare the tapes to the transcript than was the trial court or counsel.

Furthermore, no colloquy concerning the contents or accuracy of the tapes occurred in Petitioner's absence; nor did any witness testify in his absence. As such, Petitioner's presence in chambers was not necessary to the full exercise of his right to confront and cross-examine witnesses.

The in-chambers hearing had a very limited purpose - i.e., to determine the authenticity and admissibility of the transcript, not the tapes. The tapes were offered into evidence after the in-chambers proceedings. The State's Attorney asked to play the tapes again, but defense counsel objected saying that there was no need to hear again what they had just heard in-chambers, for which (he admitted) an accurate transcript existed, and to save the Petitioner from hearing what defense counsel thought would be an upsetting experience for him. The Petitioner, of course, was present when his defense counsel made these representations. While he might have aided counsel in determining whether the tapes themselves were defective, this opportunity was lost solely because of a strategic decision of his counsel that it was not in his client's best interest to have the tapes played again.

Clearly, then, the Petitioner's opportunity to defend was not prejudiced by his absence from the in-chambers proceeding.

II.

THE PETITIONER EFFECTIVELY WAIVED ANY RIGHT HE MIGHT HAVE HAD TO BE PRESENT AT THE IN-CHAMBERS PLAYING OF THE TAPES.

Assuming, arguendo, that the Petitioner had a constitutional right to be present at the in-chambers proceedings, no reason has been presented by the Petitioner as to why he may not waive

such a right and why that did not occur in the present case. While it probably would have been preferable for the trial court to have questioned him directly, the failure to do so does not preclude a finding that the Petitioner knowingly, intentionally, and voluntarily waived his right to be present. The Petitioner knew what was taking place in-chambers. He was present when his counsel (Mr. DeMayo) informed the trial court that he did not want to be present to hear the tapes. He did not object at the time of trial nor did he testify at the hearing held before the District Court that he had wanted to be present during the playing of the tapes in chambers. United States v. Sinclair, 438 F.2d 50, 52 (5th Cir. 1971). Under these circumstances, waiver may properly be implied from the defendant's conduct. See United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.), cert. denied, 409 U.S. 1063 (1972).

III.

EVEN IF THE PETITIONER WERE EFFECTIVELY DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AGAINST HIM SUCH DENIAL WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Petitioner, even assuming he were to prevail on Arguments I and II of his brief, would, nevertheless, fail in his pursuit of a writ of habeas corpus because it is apparent on the record that the Petitioner has failed to demonstrate that any prejudice resulted from his absence from the in-chambers proceedings. United States v. Sinclair, 438 F.2d 50, 52 (5th Cir. 1971).

The appropriate legal test in this situation is set forth in McKissick v. United States, 379 F.2d 754, 762 (5th Cir. 1967), as follows:

"Under the requirements of the right to be present and to confront witnesses, if appellant was absent from the proceedings in chambers and neither waived the right to be present nor consented to the proceedings being held in his absence, the conviction must be set aside and appellant discharged, unless it is clear beyond a reasonable doubt that he was not injured by such absence, but appellant will not be entitled to relief on this ground if it is determined that he was present at the proceedings in-chambers or waived his right to be present or consented to the proceedings going forward without his presence or if it is clear beyond a reasonable doubt that he was not injured by such an absence."

In *United States v. DeLeo*, 422 F.2d 487, 499, cert. denied, 90 S. Ct. 1355 (1970), this Court ruled that there must be an allegation of prejudice before the court would consider whether discussions between a trial judge and prosecutor in the absence of the defendant and his counsel was reversible error.

In the present case there has clearly been no prejudice claimed or shown to the defense of this Petitioner at his trial. The only action taken in his absence was a comparison of the typed transcription of the statement he gave police with the actual recordings. The typed statement (which the Petitioner had signed) was subsequently admitted into evidence, absent objection, as State's Exhibit K. The tapes were also entered, absent objection, as State's Exhibit L, although they were not (at the request of defense counsel) replayed in the courtroom. Since the Petitioner's defense at trial had been based on the issue of his sanity at the time of the killing of Marsha Layne, the taped and transcribed "confession" would have little bearing on this ultimate issue. This absence of

prejudice can be gleaned from what Petitioner has failed to claim before the District Court, as well as a consideration of the entire transcript (Petitioner's Exhibit 1, pg. 9 of the Joint Appendix) of Petitioner's state court trial. Thus, the court was aware that Petitioner had signed his confession and made no claim at trial that the confession was obtained involuntarily. As indicated in the first argument, supra, the comparison of the tapes with the transcript was a task which both defense counsel and the court were able to do as well as the Petitioner would have been able to do. The Petitioner has never claimed that the tapes were in any way defective or tampered with and neither the tapes nor the transcript had a bearing on the main thrust of his defense which was a claim of insanity.

Since all of these factors were obvious to the District Court from the evidence it had heard and from a review of the context provided by the transcript of the Petitioner's state court trial, the District Court clearly did not err in rendering its alternative finding that even if there had been error of constitutional dimension in allowing the Petitioner to absent himself from a crucial part of the proceedings against him, same was harmless beyond a reasonable doubt under all of the circumstances here presented. Chapman v. California, 386 U.S. 18 (1967); United States v. Huntley, 535 F.2d 1400, 1404 (5th Cir. 1976), cert. denied, 45 U.S.L.W. 3627.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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